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NO. 90-692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VICTOR ROGERS AND
LOREN SINGLETARY,
Petitioners,

v.

THE FEDERAL DEPOSIT INSURANCE CORP., As Receiver for FIRST REPUBLICBANK HOUSTON, N.A., and NCNB TEXAS NATIONAL BANK,
Respondents.

BRIEF OF RESPONDENT NCNB TEXAS NATIONAL BANK IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the *D'Oench, Duhme* doctrine precluded alleged federal securities fraud claims and defenses based on conduct of a closed bank.

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Because the ruling of the Court of Appeals on the narrow issue involved in this case is correct and does not create a conflict among the circuits, and because Congress has resolved the issue raised in this case through passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Respondent NCNB Texas National Bank ("NCNB") respectfully opposes the petition for writ of certiorari in this case.

STATUTES INVOLVED

In addition to the statutes cited in the Petition, this case involves the following statutes, as modified or enacted by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"):

12 U.S.C. § 1821(d)(9)(A)
12 U.S.C. § 1821(n)(4)(I)
12 U.S.C. § 1823(e)

The text of these statutes is set forth in the appendix to this brief.

STATEMENT

Because the Petition's Statement of the Case is premised on a mischaracterization of the lower courts' handling of the procedural posture of this case and an inaccurate portrayal of the factual record, NCNB is forced to present its own statement of the procedural and factual record on which the decisions of the Court of Appeals and the district court are premised.

1. The Federal Deposit Insurance Corporation as Receiver for First RepublicBank Houston, N.A. ("FDIC") and NCNB were named Defendant, and NCNB counterclaimed seeking recovery on promissory notes and guaranties that it had acquired by assignment from the FDIC. They moved jointly for complete summary judgment promptly after service of this action.

As summary judgment evidence, NCNB and FDIC presented a series of promissory notes and guaranties executed by Petitioners and their co-plaintiffs. NCNB further submitted an affidavit of one of its officers estab-

lishing the accrued amounts owing on the debt instruments and an affidavit of its attorney establishing reasonable fees for collection of those debts. FDIC and NCNB also submitted court records reflecting the appointment of the FDIC as receiver and the acquisition by NCNB of the debt instruments at issue in the case. Those records established that, on July 29, 1988, the Comptroller of the Currency declared First RepublicBank, Houston, N.A. ("FRB Houston"), insolvent and appointed FDIC receiver for the closed bank under 12 U.S.C. § 1821(d); and that on that same day, the FDIC as Receiver, acting pursuant to order of the District Court for the Southern District of Texas, entered into a Purchase and Assumption Agreement with a bridge bank newly formed under what was then 12 U.S.C. § 1821(i) (now codified as amended at 12 U.S.C. § 1821(n)), by which the bridge bank acquired certain assets and assumed certain liabilities of the closed bank from the receiver. The bridge bank was renamed NCNB Texas National Bank; the notes and guaranties in the summary judgment record accordingly reflect that they have been endorsed by the FDIC to NCNB.

The circumstances of the involvement of FDIC and NCNB with Petitioners' debts are therefore clearly established in the summary judgment record. FDIC was required to be appointed receiver under 12 U.S.C. § 1821 (d), and as such was legally obligated to take possession of and marshall all the assets and resolve all the liabilities of the closed bank for the benefit of the creditors and shareholders of the bank; there can be no question but that FDIC acquired Petitioners' debts in absolute good faith. NCNB was obligated by federal law as bridge bank

to acquire those assets assigned to it by the FDIC, 12 U.S.C. § 1821(i) (now (n)); NCNB likewise acquired Petitioners' assets in unquestionable good faith. By assuming responsibility for all the liabilities of the closed bank, FDIC acquired the closed bank's assets, including Petitioners' debt, for real value. By assuming those liabilities of the closed bank that it was required to assume under then 12 U.S.C. § 1821(i) (all deposit liabilities and all liabilities FDIC required it to assume), NCNB as bridge bank also aquired those debts for real value. Last, the summary judgment record established that neither the FDIC *as Receiver* nor NCNB even existed before FRB Houston was closed; by the very nature of the receivership and bridge bank processes, therefore, it was impossible for either entity to have had any knowledge about any circumstances involving the debt assets being acquired. The summary judgment record submitted by FDIC and NCNB, therefore, proved good faith and value and disproved pertinent knowledge.

Neither Petitioners nor any of their co-plaintiffs submitted or pointed out *any* evidence whatsoever in response either to the summary judgment motion of NCNB and FDIC or to the evidence submitted in support of the motion. Petitioners' lengthy recitation of the supposed facts supporting their purported claims and defenses, therefore, finds no support in the summary judgment record. NCNB and FDIC relied pointedly on Petitioners' failure to submit any summary judgment evidence—both before the district court in their reply brief in support of summary judgment, and in their brief in the Court of Appeals—as full justification for the summary judgment they sought (and ultimately obtained).

Petitioners try to cover up this lack of record support for their arguments by advancing the erroneous contention that their "federal securities fraud claims were taken as admitted for purposes of summary judgment." Pet. 2 fn. 1. The district court did not consider Petitioners' claims to have been admitted; to the contrary, the district court's summary judgment order recites that Petitioners had raised "no material issues of fact," Pet. App. 25a. The Fifth Circuit assumed for the sake of argument that Petitioners had "stated a claim for securities fraud against" the closed bank, Pet. App. 10a; this is a mere acknowledgement, however, that Petitioners' allegations might have survived a motion to dismiss, not an indication that Petitioners' bare pleadings were being, or could have been, taken as true for the purposes of the summary judgment motion. To the contrary, the Court of Appeals concluded that its holding on the impact of the *D'Oench, Duhme* doctrine meant that it was "not" necessary to "consider whether there were genuine issues of material fact concerning the alleged fraud." Pet. App. 14a.

In any event, because Petitioners presented no evidence, the summary judgment record contains absolutely no valid proof of any element of Petitioners' purported federal securities claims or defenses or their factual arguments for avoiding *D'Oench, Duhme.* There is even no valid summary judgment evidence of a security or the sale of any stock. There is thus no evidence that Petitioners' debt is in any way connected with a purchase or sale of securities. (Part of Mr. Rogers' debt, for example, is in fact related to his purchase of a title company.) There is no evidence of reliance by either Petitioner on any representation or omission of the closed bank, either in purchasing

any stock or in executing the debt instruments (probably because Petitioners, who were themselves directors of the two Texas National Banks, *see* Petition, p. 3, were promotors of the two bank capitalizations, and because Mr. Rogers was a law partner of individual defendant Riddle, so that neither Petitioner could swear under oath that actions, representations or omissions of the closed bank had anything to do with their decisions to become involved with the Texas National Banks). Most important of all, there is no valid summary judgment evidence of any fraud by anyone, much less deliberate fraud by the closed bank.

Similarly, there is no proof that the FDIC *as Receiver* or NCNB had any actual knowledge of any conduct of the closed bank. Petitioners have never suggested that NCNB could have had any such knowledge. And their arguments that the FDIC had knowledge are based on mere allegations made by the receiver of a different closed bank in pleadings that were, once again, not made part of the summary judgment record (no doubt because the same district court that granted judgment in this case had already dismissed those pleadings with prejudice).

In conclusion, the factual record relevant on this appeal of a summary judgment contains no evidence to support any of the factual claims made in the Petition. For this reason at least, the district court granted the joint motion of FDIC and NCNB for summary judgment. Pet. App. 25a-30a.

2. On appeal, the FDIC and NCNB asserted three grounds for affirmance of the district court decision. First, they noted that this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), compelled an award of

summary judgment because Petitioners failed to submit any evidence in opposition to the summary judgment motion. Second, because all of Petitioners' claims and defenses to the debt instruments were based on the alleged fraud of FRB Houston in supposedly failing to tell Petitioners about certain allegedly material aspects of their stock investment in two other failed banks, FDIC and NCNB argued that those claims and defenses would be barred by the principle announced by this Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). Last, the FDIC and NCNB argued that the circumstances of their possession and ownership of the debt instruments executed by Petitioners required that they be deemed protected as a matter of law by Section 29(c) of the Securities and Exchange Act, 15 U.S.C. § 78cc(c), the "innocent purchaser" provision of the federal securities laws.

The Court of Appeals addressed only the second issue, affirming on the basis of *D'Oench, Duhme*. The court acknowledged that the "oral side agreement" at issue in *D'Oench* had become the paradigmatic "secret agreement" barred by the [*D'Oench, Duhme*] doctrine. Pet. App. 6a. It further noted that in *Langley v. FDIC*, 484 U.S. 86 (1987), this Court had more recently rejected a narrow interpretation of the category of "agreements" governed by the federal common law doctrine and its statutory counterpart 12 U.S.C. § 1823(e), and had held that any unwritten condition to an unqualified promise to repay is just such an agreement, even if the condition, like the condition to repayment posited by Petitioners, is the "truthfulness of a warranted fact," *id.* at 93. Pet. App. 8a-10a.

The Court of Appeals could find no reason to create an exception to the *D'Oench, Duhme* doctrine merely because the fraudulent inducement involved transactions governed by the federal securities laws. It noted that "[e]xcept for the fact that the asset [securing the debt instruments] in this case is stock rather than land, and its sale thus regulated by federal law," this case is "essentially indistinguishable" from *Langley*. Pet App. 11a. The court acknowledged that only one prior court had expressly rejected federal securities claims "on the basis of the *D'Oench, Duhme* doctrine," and that other courts had skirted the issue, but also noted that similar state securities claims had been rejected under the doctrine. Pet. App. 11a-12a. The court further reasoned that enforcement of the federal securities laws would not be threatened by straightforward application of the *D'Oench, Duhme* doctrine. Blocking Petitioners federal securities claims against the FDIC, and precluding federal securities defenses against collection by NCNB, would "not deprive [them] of protection under the federal securities laws because borrowers can always sue"—as Petitioners did in this case —"the individuals who actually defrauded them." Pet. App. 12a-13a. The court concluded by quoting the reasoning of a prior panel that application of the *D'Oench, Duhme* doctrine merely " 'favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can.' *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990)." Pet. App. 13a.

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no reason to grant a writ of certiorari to review the Court of Appeals' faithful application of settled precedent of this Court in the narrow context of this case.

1. The decision of the Court of Appeals that the *D'Oench, Duhme* doctrine precludes certain federal securities fraud claims and defenses does not conflict with applicable decisions of this Court. The panel's reliance on the decision in *D'Oench, Duhme* fully conforms with this Court's subsequent decision in *Langley* and clearly does not conflict with decisions of this Court that predate, and thus do not even address, the *D'Oench* decision. This Court, moreover, has recently reaffirmed that common law defenses may be available in limited situations to defeat express and implied statutory securities fraud claims. The *D'Oench, Duhme* doctrine is just such a narrow federal common law principle, and the Court of Appeals faithfully analyzed and correctly resolved the issues this Court has identified for determining the applicability of common law defenses to federal securities claims.

2. The decision of the Court of Appeals does not conflict with the decision of any other Court of Appeals on the same matter. The decision of the Fifth Circuit in this case is entirely consistent with decisions of the Sixth Circuit that are directly on point, and appears to be consistent with an almost contemporaneous decision of the Tenth Circuit ruling that undefined securities fraud claims and defenses are not valid when asserted against the FDIC. The decision of the Court of Appeals in this case does not involve allegations of insider trading, so that it does not

conflict with the Eighth Circuit's decision that an insider trading claim is not barred by the *D'Oench, Duhme* doctrine. And the decision of the Court of Appeals in this case does not conflict with the decisions of the Eleventh Circuit in which the Eleventh Circuit declined to apply *D'Oench* to defeat federal securities fraud claims, but ruled in favor of FDIC or its assignee on the basis of other defenses to the federal securities claims. Nor does the decision below conflict with the decision of the Fourth Circuit that ruled in favor of the FDIC on the basis of a different common law defense to federal securities claims.

3. The narrow issue decided by the Court of Appeals is no longer an important question of federal law and thus does not need to be settled by this Court. Whether the *D'Oench, Duhme* doctrine defeats a federal securities law claim is an issue that arises only in the limited group of cases that contain federal securities fraud claims against a closed bank or federal securities fraud defenses against collection of a note acquired by or from an FDIC receiver. Even in this limited group of cases, plaintiffs are highly unlikely to succeed against the FDIC as Receiver or its assignee because the very nature of the receivership and assignment processes should enable FDIC and its assignees to rely in any event on the defenses and protections that are already express provisions of the federal securities laws. Since the institution of this lawsuit, moreover, Congress has passed FIRREA, which directly addresses with express statutory provisions the issue that the Court of Appeals decided under the federal common law *D'Oench, Duhme* doctrine. Future litigation will therefore not be impacted at all by the resolution of the narrow issue decided by the Court of Appeals.

4. The peculiar procedural posture of this case also makes it inappropriate for review by this Court. Petitioners' failure to present summary judgment evidence makes review by this Court difficult at best. The Court of Appeals, moreover, did not address two separate issues that NCNB contends are each separately and independently dispositive of this case. First, because the summary judgment record makes clear that Petitioners did not even attempt to raise a genuine issue of material fact on their federal securities claims, NCNB and FDIC were entitled to summary judgment on this ground alone, without reference to the *D'Oench, Duhme* doctrine. Second, the summary judgment record establishes that NCNB and FDIC were entitled as a matter of law to defeat Petitioners' federal securities claims under the express innocent purchaser provisions of the federal securities laws themselves. For these reasons as well, further review by this Court is not warranted.

REASONS FOR DENYING THE WRIT

1. The Decision Below Is Correct and Does Not Conflict with Any Decision of This Court

The Court of Appeals applied *D'Oench, Duhme* and *Langley* in a straightforward manner and correctly concluded that the *D'Oench, Duhme* doctrine is applicable to the unwritten condition to repayment of their debts posited by Petitioners which, though based on the federal securities laws, is indistinguishable from any other claim of fraudulent inducement that is governed by the doctrine. Petitioners argue that the decision below "stretches the meaning of the term 'agreement' beyond all reasonable limits" because under that decision, "virtually no condi-

tion not spelled out in a promissory note can defeat the FDIC's right to collect . . . since *any* common law *or* state *or* federal statutory [defense] automatically counts as a 'secret agreement' not to repay the note." Pet. 10 (emphasis in original). What Petitioners fail to recognize is that this very conclusion is compelled by this Court's decision in *Langley v. FDIC*, 484 U.S. 86 (1987). There this Court expressly held that any "condition to repayment of a note, including the truth of an express warranty [or implied representation], is part of the 'agreement' to which the" statutory counterpart of *D'Oench, Duhme* applies. *Id.* at 96.

Petitioners repeatedly attempt to criticize the Court of Appeals in effect for its decision, Pet. App. 10a-11a, to deem prior knowledge of the FDIC irrelevant for the purposes of applying *D'Oench, Duhme*. *See* Pet. 15, 17. This Court's decision in *Langley* again disposes of this argument, holding unequivocally that knowledge of the FDIC is simply "not relevant." 484 U.S. at 94.

Petitioners also contend that the decision below conflicts with this Court's decision in *Oppenheimer v. Harriman Nat'l Bank & Trust Co.*, 301 U.S. 206 (1937). Because the *Oppenheimer* case predates *D'Oench, Duhme*, however, the *Oppenheimer* decision does not even address the possible defenses available to FDIC to defeat a federal securities claim. The *Oppenheimer* case, moreover, concerned a bank's sale of its own stock, not a loan made to purchase stock in a different bank. In any event, as the Court of Appeals correctly noted, Pet. App. 5a n.3, the *Oppenheimer* decision "says nothing about [the] ability of [a bank shareholder] to recover from a federal receiver."

Petitioners last contend that the express provisions of the federal securities laws preclude common law defenses. Pet. 12-15. Once again, however, Petitioners' argument has been firmly rejected by recent decisions of this Court. It is true that this Court has acknowledged "the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968). Even in *Perma Life*, however, a majority of this Court concluded that some limited common law defense based on comparative fault (*in pari delicto*) would be available even under the antitrust laws. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 309 (1985). This Court in *Bateman Eichler* then established a two-prong test for determining whether a common law *in pari delicto* defense should be available in a federal securities case, requiring an analysis of 1) comparative fault; and 2) the impact of allowing the defense on federal securities law enforcement. *Id.* at 310-11. This Court has subsequently held that the *Bateman Eichler* analysis applies in determining whether the *in pari delicto* defense can be raised against any federal securities claim, express or implied. *Pinter v. Dahl*, 108 S. Ct. 2063 (1988). There can be no question, therefore, that in limited circumstances certain common law defenses can preclude federal securities law claims of any nature.

In deciding that the *D'Oench, Duhme* doctrine did preclude federal securities fraud claims and defenses, the Court of Appeals in effect applied the *Bateman Eichler* two-prong test, and applied the test correctly. The decision below properly balances the fault of Petitioners—who purported to rely on an unwritten condition to their debts and thus participated in a scheme that would tend to

mislead bank examiners—with the plain innocence of the FDIC-Receiver, as protector of the insurance fund and representative of the innocent creditors and shareholders of the closed bank—none of whom participated in the alleged wrongdoing of the closed bank. *See* Pet. App. 13a. The decision below likewise expressly, and accurately, concludes that federal securities law enforcement will not be impeded if the *D'Oench, Duhme* bars federal securities fraud claims, because a closed bank's borrowers can always sue any wrongdoer other than the closed bank. Pet. App. 2a, 12a-13a.

Because the decision below correctly applies settled precedent in this Court, review by this Court is not warranted.

2. The Decision Below Does Not Conflict with Any Decision of Another Court of Appeals

Petitioners erroneously contend that the decision below conflicts with holdings of other Courts of Appeal. Pet. 15-20. As Petitioners' own analysis indicates, there is no such conflict.

The decision below correctly notes that the Sixth Circuit, the only other Court of Appeals to address the issue directly, concluded that the *D'Oench, Duhme* doctrine bars "federal securities law defenses," *FDIC v. Investors Associates X, Ltd.*, 775 F.2d 152, 156 (6th Cir. 1985). Pet. App. 12a. Petitioners attempt to conjure up a conflict with the Sixth Circuit's decision in *Gilman v. FDIC*, 660 F.2d 688 (6th Cir. 1981). Pet. 17. The court in *Gilman*, however, expressly held that "the interests of conformity compel" identical results in federal securities and

common law fraud cases. *Id.* at 695. There is no conflict with any decision of the Sixth Circuit.

In a recent case, moreover, the Tenth Circuit rejected "securities and common law fraud" counterclaims under the *Langley* decision. *FDIC v. Bell*, 892 F.2d 64, 65 (10th Cir. 1989), *cert. dismissed*, 110 S.Ct. 2067 (1990). If anything, therefore, at least two other courts of appeal (the Sixth and Tenth Circuits) have expressly agreed with the decision below.

Petitioners also seek to manufacture a conflict between the decision below and the Eighth Circuit's recent decision in *Astrup v. Midwest Federal Savings Bank*, 886 F.2d 1057 (8th Cir. 1989). *See* Pet. 18-19. There the Eighth Circuit held that *D'Oench, Duhme* would not defeat a claim under the federal securities laws for insider profits because such a claim sounded in tort. *Id.* at 1059-60. Petitioners, however, make no insider trading claim, which would be in the nature of a conversion claim rather than a fraudulent inducement claim. As this Court held in *Langley*, a fraudulent inducement claim necessarily posits an undisclosed agreement that payment on an otherwise unconditional note is conditioned on the truthfulness of represented fact. 484 U.S. at 93. A fraudulent inducement claim under the federal securities laws is therefore premised on contract and is accordingly plainly prohibited by *D'Oench, Duhme*, even under the reasoning of the Eighth Circuit in *Astrup*. *See* 886 F.2d at 1059. There is no conflict with the Eighth Circuit.

The Eleventh Circuit has twice "declined" to apply *D'Oench, Duhme* to bar federal securities fraud claims or defenses. *Vernon v. RTC*, 907 F.2d 1101, 1108 (11th Cir. 1990); *Gunter v. Hutcheson*, 674 F.2d 862, 877 (11th Cir.) *cert. denied*, 459 U.S. 826 (1982). In *Vernon*, the Eleventh Circuit found it "unnecessary" so to "extend

the *D'Oench* doctrine," because it rejected the federal securities fraud claims against the assignee of the receiver of a failed savings and loan on the basis that the assignee had not assumed that potential liability in its transaction with the receiver. 907 F.2d at 1108. In *Gunter*, the Eleventh Circuit likewise held it unnecessary to apply *D'Oench, Duhme* "in this case," because it rejected the federal securities fraud defenses on other grounds. 674 F.2d at 877. (The *Gunter* analysis of 12 U.S.C. § 1823 (e) was, moreover, rejected by this Court in *Langley*.) Contrary to the arguments of Petitioners, Pet. 16-17, 19-20, there is no conflict between the decision below and the decisions of the Eleventh Circuit in *Vernon* and *Gunter*.

Petitioners' final effort to find a conflict in the circuits purports to rely on the Fourth Circuit's decision in *FDIC v. Aroneck*, 643 F.2d 164 (4th Cir. 1981). There the FDIC did not even raise *D'Oench, Duhme*, because it was able to prevail by establishing an *in pari delicto* defense, as Petitioners acknowledge. Pet. 18. There is no conflict at all between the decision below and the decision in *Aroneck;* each Court of Appeals simply chose to address different issues, but decided in favor of FDIC in either event.

Review is not needed to resolve any conflict in the circuits.

3. Review by This Court Is Not Warranted on the Narrow Issue of Law Underlying the Decision Below, Which Has Been Made Moot in Any Event by Subsequent Congressional Action

The issue resolved in the decision below is a narrow one that will have arisen only in rare circumstances. There

must be a claim or defense based on fraudulent inducement in connection with the purchase of a security. A failed financial institution must have been a legitimate defendant. As Judge Brown admitted in his dissent:

> In the vast majority of cases, the [federal securities laws] will not be available [when *D'Oench, Duhme* is involved]. And even when Securities Act fraud is involved, the actual knowledge hurdle [of § 29(c) of the Securities and Exchange Act] will be a tough hurdle to overcome.

Pet. App. 24a. Review by this Court is therefore unwarranted on a narrow issue of such limited importance.

In any event, review is not warranted because of changes in the banking laws enacted by Congress through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Publ. L. No. 101-73, 103 Stat. 183. As the court of appeals noted (see Pet. App. 7a and note 4), prior to 1989, 12 U.S.C. § 1823(e) applied only when the FDIC was acting in its corporate capacity and not when it was acting as a receiver. But Section 1823(e) was amended in 1989 to apply as well when, as here, the FDIC is acting "as receiver of any insured depository institution." 103 Stat. 256. In addition, Congress added 12 U.S.C. § 1821(d)(9)(A), which states that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation." § 212, 103 Stat. 231. Congress also added 12 U.S.C. § 1821(n)(4)(I), which applies the four requirements of section 1823(e) to any asset acquired by a bridge bank like NCNB. 103 Stat. 249. In the future there will be no question that federal securities

fraud claims and defenses will be barred by these statutory provisions.

4. The Procedural Posture of This Case and the State of Its Record Make It Inappropriate for Review by This Court

Petitioners unfairly criticize the Court of Appeals for having "recast" their claims and defenses as fraudulent inducement claims and defenses when in fact they are claims based on allegedly fraudulent sales of securities. Pet. 8-11. Instead, it is Petitioners themselves who are to blame for any mischaracterization, for it is they who failed to present any summary judgment evidence to support those claims, however they might be characterized. For this reason alone, the record in this case is not adequate to support meaningful review by this Court.

The plain truth, moreover, is that Petitioners' claims against FDIC are *not* based on the sale of securities, because FRB Houston did not sell any of the stock in the Texas National Banks, and Petitioners do not allege that it did. If the claims had any factual foundation at all, they were based on the closed bank's supposed fraudulent inducement of the execution of Petitioners' notes and guaranties. It is for this reason that Petitioners conceded below that their *common law* fraud claims were indeed barred by *D'Oench, Duhme*: Petitioners' claims and defenses are premised on fraudulent inducement. The Court of Appeals, therefore, correctly characterized Petitioners' claims and defenses. Review is plainly not warranted on this ground.

Review is also not warranted because FDIC and NCNB raised valid grounds for affirming summary judgment independent of the narrow ruling of the Court of Appeals.

Specifically, summary judgment was warranted under both Rule 56 of the Federal Rules of Civil Procedure and Section 29(c) of the Securities & Exchange Act.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a district court "shall" grant summary judgment when the summary judgment record shows no genuine issues for trial and the movant's right to judgment as a matter of law. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), this Court held that:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial.

In other words, on issues like all the elements of Petitioners' federal securities defenses to the debt instruments and all the elements of their affirmative federal securities claims, on which Petitioners would have borne the burden of proof at trial, Petitioners were required "to go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial'." *Id.* at 324, *quoting* Fed. R. Civ. P. 56(e); *accord, Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3188 (1990). Because Petitioners offered no summary judgment evidence, however, they raised no genuine issue of fact with respect to any element of their purported federal securities laws claims or defenses. There is no evidence of a security, no evidence of fraud, no evidence of reliance by any Plaintiff. For this reason alone, the district court properly rendered summary judgment.

Section 29(c) of the Securities and Exchange Act, provides, in effect, that no violation of the federal securities law may serve as a defense to any debt or obligation against "any person who shall have acquired such debt [or] obligation . . . in good faith for value and without actual knowledge of the violation." 15 U.S.C. § 78cc(c). As a consequence of the receivership and bridge bank processes, as established in the summary judgment record, both the FDIC as Receiver and NCNB in fact acquired Petitioners' debts in good faith for value and without actual knowledge of any federal securities violation by FRB Houston. As a matter of law, FDIC and NCNB were innocent purchasers under Section 29(c). For this reason as well, summary judgment was entirely proper.

CONCLUSION

For the foregoing reasons, there is no valid reason to grant the writ. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX

12 U.S.C. § 1821(d)(9(A)

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

12 U.S.C. § 1821(n)(4)(I)

(4) Powers of bridge banks

Each bridge bank chartered under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, a national bank, except that—

(I) no agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement—

(i) is in writing,

(ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by such insured bank in default,

(iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(iv) has been, continuously from the time of its execution, an official record of such insured bank in default;

12 U.S.C. § 1823(e)

(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.